Supreme Court, U. S.
FILED
FEB 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- **76-1067**

JOHN HEMPHILL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARGARET BUSH WILSON
WILSON, SMITH, WUNDERLICH & SMITH
4054 Lindell Blvd.
St. Louis, Missouri 63108
Telephone: 314/534-4400

SHELDON S. COHEN
STUART E. SEIGEL
STANLEY I. LANGBEIN
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: 202/293-4740

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
DECISION BELOW	1
JURISDICTION OF THIS COURT	1
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	7
I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER AND IN WHAT CIRCUMSTANCES INTERNAL REVENUE SERVICE OFFICERS MAY APPLY PAYMENTS OF ONE TAXPAYER TO THE ACCOUNT OF ANOTHER, WHEN THE APPLICATION RESULTS IN THE IMPOSITION OF CRIMINAL SANCTIONS FOR THE NONPAYMENT OF THE PAYOR'S TAXES	7
II. CERTIORARI SHOULD BE GRANTED TO CONSIDER THE STANDARD OF FAULT APPLICABLE UNDER SECTIONS 7215 AND 7512	12
CONCLUSION	17

TABLE OF CITATIONS

CASES:

F. H. McGraw & Co. v. Sherman Plastering Co., 60 F. Supp. 504 (D. Conn.), *aff'd*, 149 F.2d 301 (2d Cir. 1943), *cert. denied*, 326 U.S. 753 (1944)	9
Koehring Co. v. United States, 303 F.2d 468 (10th Cir. 1962)	9
Lambert v. California, 355 U.S. 225 (1957)	13
Paulton v. United States, 540 F.2d 886 (8th Cir. 1976)	13, 14
Spies v. United States, 317 U.S. 492 (1943)	12
United States v. Heffner, 420 F.2d 809 (4th Cir. 1969)	11
United States v. Leahey, 434 F.2d 7 (1st Cir. 1970)	11
United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975)	11

Page

STATUTES:

Internal Revenue Code of 1954 (26 U.S.C.)

Section 7201 13
Section 7202 13
Section 7203 13
Section 7204 13
Section 7207 13
Section 7215 .....*passim*
Section 7512 .....*passim*

MISCELLANEOUS:

Restatement of Contracts §§ 387, 589, 591 (1932) 9

Williston on Contracts §§ 1795-96 (3d Ed. 1972) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

JOHN HEMPHILL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DECISION BELOW

The decision of the Court of Appeals for the Eighth Circuit is reported at 544 F.2d 341, and at 76-2 USTC ¶ 9762, and 39 AFTR 2d ¶ 77-313.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals for the Eighth Circuit in this case issued November 8, 1976. Judgment was entered on that date. The Court of Appeals denied the petitioner's petition for rehearing on December 28, 1976. The jurisdiction of this Court is based upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER INTERNAL REVENUE SERVICE OFFICERS, IN THE ABSENCE OF WRITTEN DIRECTIONS, MAY APPLY PAYMENTS BY ONE TAXPAYER TO THE ACCOUNT OF ANOTHER, WHERE SUCH APPLICATION RESULTS IN THE IMPOSITION OF CRIMINAL SANCTIONS?

II. WHAT STANDARD OF FAULT SHOULD BE APPLIED UNDER SECTIONS 7512 AND 7215 OF THE INTERNAL REVENUE CODE, CRIMINAL TAX STATUTES WHICH DO NOT REQUIRE A FINDING OF "WILLFULLNESS"?

STATUTES INVOLVED

The statutes involved in this case are Sections 7512 and 7215 of the Internal Revenue Code, 26 U.S.C. §§ 7215, 7512 (1970). The case also involves Section 301.6311(c)(1)(iii) of the Income Tax Regulations of the Treasury Department, 26 C.F.R. § 301.6311 (c)(1)(iii). These provisions are set forth in full as Appendix A to this petition.

STATEMENT OF THE CASE

On December 23, 1975, the petitioner was indicted by a grand jury for the Eastern District of Missouri on 12 counts of violating Sections 7512 and 7215 of the Internal Revenue Code. The full text of these sections is quoted in Appendix A to this petition. The indictment charged that the petitioner, as President of Hemphill Contracting Co., Inc. ("Hemphill Contracting"), failed at the time and in the manner prescribed by the Internal Revenue Code, and by regulations under the Code, to collect, account for, and pay over withheld taxes for the calendar quarters ending March 31, 1974; June 30, 1974; September 30, 1974; December 31, 1974;

and, March 31, 1975. The indictment alleged that the petitioner was notified May 1, 1975, of this failure by notice delivered in accordance with Section 7512(a) of the Code. The indictment charged that after this notification, the defendant, on twelve occasions between May 9, 1975, and July 25, 1975, failed to comply with the terms of notice, by failing to deposit, within two banking days of the date of collection of the amounts, withheld amounts in a special bank account to be held in trust for the United States.

The petitioner was tried before a jury February 18 and 19, 1976. On February 19, the jury returned a verdict of guilty on all 12 counts. At the close of the Government's evidence, the defendant moved for a judgment of acquittal, which motion was denied. He again moved for a judgment of acquittal at the close of all the evidence. Ruling on this motion was reserved, the judge inscribing on the motion, "overruled at this time—ruling reserved." On February 25, 1976, the defendant moved for a judgment of acquittal, or, in the alternative, for a new trial. The trial court granted the motion for a judgment of acquittal on May 10, 1976, and the Government appealed.

On November 8, 1976, the Court of Appeals for the Eighth Circuit entered its judgment reversing the District Court. 544 F.2d 341. The Court held that the evidence in the record was sufficient to take the case to the jury, and that the District Court therefore erred in entering the judgment of acquittal. The Court of Appeals denied petitioner's petition for rehearing on December 28, 1976.

The principal factual dispute at trial concerned the petitioner's deposit record in the "pre-notification"

period relevant under the indictment, *i.e.*, the five calander quarters between January 1, 1974, and March 31, 1975. The central questions grew out of certain dealings during those periods between the petitioner and a revenue officer, Robert L. Moore, who was the Government's principal witness at trial. Prior to 1974, the petitioner, in addition to his interest in Hemphill Contracting, held a 37 percent interest in another contracting firm, Hempbrook Contracting Corporation ("Hempbrook"). (Tr. 145).[1] The remaining 63 percent interest in that corporation was held by another individual, Sam Brooks, and his wife Lois Brooks. (Tr. 141, 145). Hempbrook went out of business in 1973. (Tr. 141.) At the time Hempbrook went out of business, it owed substantial amounts for withheld taxes. (Tr. 44-46, 145). In November, 1974, Mr. Moore informed the petitioner that he planned to assess the entire amount of the Hempbrook back tax liability against the petitioner personally (Tr. 44, 145), presumably as a 100% penalty under Section 6672 of the Internal Revenue Code for failure to pay over amounts withheld from employees.[2] In furtherance of

---

[1] References to the transcript of the trial in this case will be cited herein as (Tr.).

[2] Mr. Moore did not testify at trial concerning the precise basis upon which he decided that he was authorized to impose the entire Hempbrook liability personally upon the petitioner. (See Tr. 44-48.) The petitioner testified, however, that Mr. Moore had told him, the petitioner, that the decision not to seek to collect any of the taxes from Mr. Brooks, the majority owner of Hempbrook, was based upon Mr. Moore's belief that Mr. Brooks would not have had sufficient funds to satisfy the liability. (Tr. 145)

this intention the petitioner executed a part payment agreement with Mr. Moore in November, 1974, concerning the outstanding liability.

The central questions at trial concerned Mr. Moore's allocations of certain payments made by Hemphill Contracting by means of checks drawn upon the Hemphill Contracting bank accounts, between the petitioner's personal liability for the transferred Hempbrook taxes, and current Hemphill tax liabilities. During the fourth quarter of 1974, and the first quarter of 1975, the petitioner made a number of payments to Mr. Moore, by means of Hemphill Contracting checks (see Tr. 13), which Mr. Moore credited to the Hempbrook liability, rather than crediting them against the current Hemphill Contracting tax liability (Tr. 70-82, 91-97). The result of this action was a delinquency in the Hemphill Contracting tax accounts which formed the basis for the allegations in the indictment concerning the defendant's failure to account for, pay over, or collect taxes in the "pre-notification" period. For the testimony was undisputed that during the first quarter of 1974, Hemphill Contracting made payments in full of all withholding amounts for which it was liable and that, during the second and third quarters, Hemphill Contracting timely filed quarterly employment tax returns on the due date, and paid the amounts due with each return. The testimony was further undisputed that the total of all payments made by the Hemphill Contracting during the forth quarter of 1974, and the first quarter of 1975, including those credited by Mr. Moore to the Hempbrook taxes, exceeded the total amount of the Hemphill Contracting liability for each

quarter.[3] With the payments allocated in the manner in which Mr. Moore allocated them, however, Hemphill Contracting's current tax account showed a substantial delinquency, which delinquency formed the basis for the indictment.

These facts give rise to the two questions raised in this petition.

The first concerns the power of the Internal Revenue Service, and its various officers, to make allocations of payments of taxes among the accounts of different taxpayers. In this case, the revenue officer took the check of one taxpayer, Hemphill Contracting, and applied it to the account of another, the petitioner. The end result of his application of the payments was a delinquency in the payor's account, with the resulting imposition of criminal sanctions upon the petitioner as an officer of Hemphill Contracting. This raises important and unresolved questions concerning the administration of the criminal provisions of the internal revenue laws. This Court should grant certiorari to consider and resolve these issues. The second question concerns the standard of fault to be imposed under Section 7512 with respect to failures in what we term the "prenotification" period. We suggest within that this Court should grant certiorari to consider the extent to which a conviction under Section 7512 and 7215 re-

[3] There is attached to this petition, as Appendix B, a table comparing the amounts paid by Hemphill Contracting, including the amounts credited by the revenue officer to the petitioner's personal liability, and the amounts assessed for each of the five relevant quarters. The table shows that the amounts paid by Hemphill Contracting for the first three quarters equalled the amounts assessed, and that, for the fourth and fifth quarters, the amounts paid, including amounts credited to the petitioner's personal liability account exceeded the amounts due from Hemphill Contracting.

quires that the evidence show the defendant knew or should have known that his "pre-notification" failures did not comply with all applicable regulations.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER AND IN WHAT CIRCUMSTANCES INTERNAL REVENUE SERVICE OFFICERS MAY APPLY PAYMENTS OF ONE TAXPAYER TO THE ACCOUNT OF ANOTHER, WHEN THE APPLICATION RESULTS IN THE IMPOSITION OF CRIMINAL SANCTIONS FOR THE NONPAYMENT OF THE PAYOR'S TAXES.

In entering the judgment of acquittal, the District Court held that the Government had acted impermissibly in applying Hemphill Contracting checks to the personal account of the petitioner.[4] In reversing the District Court, the Court of Appeals referred to the matter of the dealings between the revenue officer and the petitioner, and rested its judgment upon the simple finding that the testimony of the petitioner was "contradicted" by the testimony of the revenue officer. 544 F.2d at 344. In so holding, however, the Court of Appeals misconstrued the thrust of the District Court's decision. For the only "contradition" in the testimony between the petitioner and the revenue officer concerned whether the petitioner orally instructed the revenue officer to apply the payments as the officer applied them.[5] The District Court's judgment reflcted a con-

[4] A copy of the orally delivered decison of the District Court is appended to this petition.

[5] The petitioner testified that the revenue officer's practice in dealing with him was to call him and to tell him the amounts which were due, and that he, the petitioner, never directed application of the payments (see Tr. 143-45, 163-64, 197-98). Mr. Moore, on the other hand, testified that the petitioner "directed" him as to the application of the payments (Tr. 71-75), although on further questioning, he testified that all he meant by this statement was

clusion that this oral testimony was irrelevant, because *as a matter of law* the Government was bound to apply the payments made by Hemphill Contracting and drawn against Hemphill Contracting accounts to the liability of *Hemphill Contracting*, not to the petitioner's personal liability.

The question raised by this petition, therefore, concerns whether the Government's proof of oral instructions by the petitioner to the revenue officer—if the proof was sufficient to go to the jury—is sufficient to sustain the imposition of criminal liability in this case. This question is a significant one from the standpoint of the administration of the criminal provisions of the Internal Revenue laws. The question concerns the authority of internal revenue officers to apply payments by one taxpayer to the account of another, when the application in this manner results or may result in the imposition of criminal sanctions upon the payor. We contend that where the Government prosecutes a person for nonpayment of taxes, and where the Government's case depends upon the application of payments among the accounts of two different taxpayers, the Government must show that the application was directed by *written*, not oral, instructions. Too much is at stake to countenance informal and uncorroborated directions as the basis of criminal liability. We believe this principle is important to the administration of the federal criminal tax laws, and that this

that he would call the petitoner telling him the amount to bring, and that the petitioner would thereafter "direct" him to apply the payments in accordance with the call. (Tr. 90-91, 94, 96-97.) There was no material contradiction concerning the amounts assessed for each of the relevant quarters, nor concerning the amounts of the payments made during the relevant period by the petitioner. See note 3 *supra*, and the table attached to this petition as Appendix B.

Court should grant certiorari to consider the questions it raises.

The ordinary common law rule is that when a debtor makes a payment which is allocable to more than one account, the debtor has power in the first instance to direct the application of the payment in any manner he chooses. Restatement of Contracts § 387 (a) (1932); Williston on Contracts, § 1795 (3d ed. 1972); *see Koehring Co.* v. *United States*, 303 F.2d 468 (10th Cir. 1962). If the debtor does not direct the application of the payment, then the creditor may direct it. Restatement of Contracts, § 387(b); Williston on Contracts § 1796 (3d ed. 1972); *see, e.g., F. H. McGraw & Co.* v. *Sherman Plastering Co.*, 60 F. Supp. 504 (D. Conn.), *aff'd*, 149 F.2d 301 (2d Cir. 1943), *cert. denied*, 326 U.S. 753 (1944). The creditor's power to determine the application of the payments is more restricted than is the debtor's. Restatement of Contracts § 387(b). The creditor is not permitted to apply a payment to the exclusion of a claim, the failure to discharge which will work a forfeiture (Restatement of Contracts § 389), and must notify the debtor of the method of his application of the payments. Restatement of Contracts § 391.

In the ordinary common law setting, there are no restrictions on the manner in which a creditor, or any other party, may prove the "directions" given by the debtor, and they may even be inferred from the surrounding circumstances, without proof of express directions. Restatement of Contracts § 387, comment e; Williston on Contracts § 1795 (3d ed. 1972). But this case does not present the ordinary situation of a debtor making a single payment applicable to more than one of his own debts. In the first place, the two

"accounts" in this case were the accounts of two different taxpayers, Hemphill Contracting and the petitioner, and the payment was made by only one of these parties, the corporation. In these circumstances, clear and convincing proof should be required as a basis for the application of the payments by one party to the liability of a party other than the party making the payment. Further, the application of the payments in this case was made to the exclusion of an account, the nonpayment of which carried *criminal penalties.* By analogy to the common law rule limiting a creditor's power to apply a payment in such a way as to work a forfeiture, the Internal Revenue Service's power to apply a payment in such a way as to give rise to criminal liability must be carefully limited.

But whatever may be the common law rules, the Treasury Department's regulations make clear that where payments of tax liabilities are concerned, written "directions" are required when a payment is to be applied among different accounts. The pertinent provision appears at 26 C.F.R. § 301.6311-1(a)(1)(iii), which provides:

> (iii) If one check or money order is remitted to cover two or more persons' taxes the remittance should be accompanied by a letter of transmittal clearly identifying—
>
> (a) each person whose tax is to be paid by the remittance;
>
> (b) the amount of the payment on account of each such person;
>
> (c) the kind of tax paid.

The Courts of Appeals have held that the IRS must "scrupulously observe rules, regulations, or procedures

which it has established"; and that "[w]hen it fails to do so, its action cannot stand and courts will strike it down". *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969); *United States* v. *Sourapas*, 515 F.2d 295 (9th Cir. 1975); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970). The provisions of Section 301.6311-1 (a)(1)(iii), if they did not in this case make the revenue officer's action in accepting payment without a written letter of transmittal outright unlawful, at a minimum made a written letter of transmittal a condition precedent to the application of those payments among the accounts of different taxpayers. In this case, this regulation should be held to render ineffective any oral directions by the petitioner to the revenue officer to apply the payments in the manner in which they were applied. If the regulation is so read, then the District Court was correct in entering its judgment of acquittal, and the Court of Appeals erred in reversing that judgment on the basis of "contradictions" in the trial testimony.

There are inherent dangers in permitting internal revenue officers to make informal applications of payments among the accounts of different taxpayers, or among different accounts of the same taxpayer. Officers may simply misunderstand the oral directions of the taxpayers; or officers may, in some circumstances, even abuse the power to make applications. These dangers are heightened when criminal sanctions may result from the manner in which an internal revenue officer has applied a particular payment.

In light of these considerations, the power of such officers to make applications of taxpayers' payments should be carefully circumscribed, and carefully de-

fined. A rule requiring that applications of one party is payment to the liability of another be directed in writing, and that in a criminal case the Government must prove that such directions were in writing, would protect against the potential for abuse and injustice. This Court should grant certiorari to establish such a rule.

II. CERTIORARI IS APPROPRIATE TO CONSIDER THE STANDARD OF FAULT APPLICABLE UNDER SECTIONS 7215 AND 7512.

Certiorari is also appropriate in this case to consider the standard of fault applicable in prosecutions under Sections 7215 and 7512, particularly the standard of fault applicable under the requirement that the prosecution show a "failure" to comply with applicable requirements (see § 7512(a)) in the "pre-notification" period.

The persistent theme of this Court's decisions in criminal tax cases has been that, while "[s]anctions to insure payment of the tax are even more varied to meet the variety of causes of default", *Spies* v. *United States,* 317 U.S. 492, 496 (1943), "[i]t is not the purpose of the law to penalize frank difference of opinion despite the exercise of reasonable care". *Id.* In other words, this Court has held that, with respect to both civil and criminal penalties under the tax code, there must be some showing of fault.

This Court has recognized that the provisions of the Internal Revenue Code imposing criminal penalties, which appear as Subchapter A of Chapter 75 of the Code, represent the "climax of this variety of sanctions" under the Code. *Spies, supra,* at 496. The predominant standard under the most widely applicable

statutes imposing criminal penalties for violations of the tax laws is the standard of "willfulness". This is the standard imposed under the provisions making criminally punishable an attempt to evade or defeat tax (§ 7201); under the provisions proscribing failure to collect or pay over tax (§ 7202); those proscribing failure to file a return, supply information, or pay tax (§ 7203); those providing sanctions for failure to supply information to employees concerning withholding (§ 7204); those making criminal the filing of false returns or statements (§ 7207); those making criminal the failure of an employee to supply information for withholding purposes to his employer (§ 7204).

When Congress, in 1958 added Sections 7215 and 7512, to the subchapter comprising the federal criminal tax statutes, it chose not to include a requirement that the Government show "willfulness". See *Paulton* v. *United States,* 540 F.2d 886 (8th Cir. 1976). And, indeed, Section 7215(a) provides simply that "[a]ny person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor", without qualification requiring any degree of fault. Some fault requirement is implied, however, by Section 7215(b). That section provides for "[e]xceptions" for "any person, if such person shows there was reasonable doubt as to (A) whether the law required collection of the tax, or (B) who was required by law to collect tax", and for "any person, if such person shows that the failure to comply with the provisions of Section 7512(b) was due to circumstances beyond his control". As the Eighth Circuit recognized in *Paulton,* these exceptions impose a burden of production on the defendant, so that the Government does not have, in the first

instance, to show fault. However, as recognized in *Paulton,* once the defendant has met his burden of production, it is the responsibility of the Government to show by a preponderance of the evidence that the exception does not apply.

The question posed by this case is the degree of fault required with respect to the conduct of a defendant in the "pre-notification" period. The Court of Appeals for the Eighth Circuit, in its decision in this case, and in the *Paulton* case, *supra,* has construed Section 7215 in a manner which permits the imposition of strict criminal liability under Section 7215 in certain cases. For the Court of Appeals, both in *Paulton* and in its decision in this case, held that, with respect to the "pre-notification" period, all the Government had to do, in making out a *prima facie* case, was to show that in the "pre-notification" period the defendant in some respect failed to comply with some applicable deposit requirement. For the purposes of establishing this "element" of a Section 7215-7512 offense, as defined by the Eighth Circuit, it is irrelevant whether the failure shown was willful, negligent, or without fault. The *Paulton* opinion, and the opinion below, do recognize the statutory exception set forth as Section 7215(b)(1), which refers to the "pre-notification" period. But those opinions construe that exception narrowly to permit a defense based upon reasonable doubt as to only (1) the existence of a legal obligation to collect, or (2) the identity of the person upon whom the legal obligation is imposed.

The difficulty with this narrow construction is that it leaves lacunae within which the statute imposes criminal liability on a strict liability basis. For, in the

"pre-notification" period, an employer may have had no doubt as to the existence of a requirement that he collect withholding taxes, and no doubt that the requirements apply to him, but might still have reasonable doubt as to some other facet of the withholding requirements, which may have led to his failure to comply precisely with applicable deposit requirements. This case presents an example. If the petitioner, because of the payments he had made to the revenue officer, which the revenue officer applied to the petitioner's personal liability, had reasonable belief that his deposit liabilities had been satisfied, then the imposition of criminal liability in this case amounts to the imposition of criminal liability without fault. The question is whether and the extent to which this should be permitted under Sections 7512 and 7215.

This Court should construe Sections 7215 and 7512 to exonerate a defendant whose failure to meet its obligations under the applicable regulations governing deposits is based on reasonable doubt as to *any* aspect of those obligations. Such a construction of those provisions is supported by two lines of argument.

First, the language of the statute should be construed to permit a defense based upon reasonable doubt as to any applicable requirement. In this case, or a case like it, where a defendant has proceeded upon reasonable belief that his deposit obligations have been satisfied, he may be said to have had "reasonable doubt . . . that the law required collection" in the particular circumstances, even though he had no doubt as to the existence of collection requirement, or of the fact that such requirements were imposed upon him. Further, it can be argued that whenever, in the particular circumstances, a defendant does not know of some particular

aspect of the applicable requirements, and there is a reasonable basis for his lack of knowledge, he has "reasonable doubt . . . that the law require[s] collection" within the meaning of the statute. This Court has recognized as a principle of statutory construction that statutes should be construed to avoid the imposition of criminal liability without fault, that "[c]onsiderations of hardship often lead courts, naturally enough, to attribute to a statute the requirements of a certain mental element—some consciousness of wrongdoing and knowledge of the law's command—as a matter of statutory construction". *Lambert* v. *California,* 355 U.S. 225, 231 (1957) (Frankfurter J., concurring).

Second, beyond its construction of the language of Section 7215, this Court should recognize that there is an implied requirement of fault in all federal criminal tax statutes. This Court's recognition in *Spies,* that criminal sanctions represented the "climax" of the "variety of sanctions" imposed under the Internal Revenue Code, implied a recognition that those sanctions should be imposed only upon the basis of some finding of fault, not upon a strict liability basis. The Court in *Spies* recognized that beneath the "climax" in the criminal provisions lay the provisions for civil penalties, now codified at Chapter 68 of the Internal Revenue Code, § 6651 et seq. The civil penalties typically are not imposed where a person's failure to meet his obligations is based upon "reasonable cause, and not due to willful neglect". See, e.g. § 6651(a)(1)-(2), 6652. The special penalty provision for failure to deposit, Section 6656, imposes this standard. It would be anomalous in the extreme if there existed circumstances in which conduct which could not justifiably be subject to a civil penalty under Section 6656 could

be criminally punished under Section 7215. Yet that is precisely what the interpretation of Section 7215 set forth by the Eighth Circuit in this case and in *Paulton* authorizes, by implying there are lacunae within which a defendant's reasonable mistakes concerning his deposit obligations in the "pre-notification" period do not constitute a defense in a Section 7215 prosecution.

This Court should grant certiorari to determine the existence and scope of the fault requirement to be imposed under Section 7215.

CONCLUSION

For the reasons stated above, the Court should grant certiorari to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

MARGARET BUSH WILSON
WILSON, SMITH, WUNDERLICH & SMITH
4054 Lindell Blvd.
St. Louis, Missouri 63108
Telephone: 314/534-4400

SHELDON S. COHEN
STUART E. SEIGEL
STANLEY I. LANGBEIN
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: 202/293-4740

APPENDIX

APPENDIX A

1. Section 7215 of the Internal Revenue Code, 26 U.S.C. § 7215.

Section 7215. Offenses with Respect to Collected Taxes

(a) Penalty.—Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

(b) Exceptions.—This section shall not apply—

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

2. Section 7512 of the Internal Revenue Code, 26 U.S.C. § 7512.

Section 7512. Separate Accounting for Certain Collected Taxes, Etc.

(a) General Rule.—Whenever any person who is required to collect, account for, and pay over any tax imposed by subtitle C or by chapter 33.

(1) at the time and in the manner prescribed by law or regulations (A) fails to collect, truthfully account for, or pay over such tax, or (B) fails to make deposits, payments, or returns of such tax, and

(2) is notified, by notice delivered in hand to such person, of any such failure,

then all the requirements of subsection (b) shall be complied with. In the case of a corporation, partnership, or

trust, notice delivered in hand to an officer, partner, or trustee, shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

(b) Requirements.—Any person who is required to collect, account for, and pay over any tax imposed by subtitle C or by chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C or chapter 33 which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee. Source: Added by P. L. 85-321.

(c) Relief From Further Compliance With Sub-Section (b).—Whenever the Secretary or his delegate is satisfied, with respect to any notification made under subsection (a), that all requirements of law and regulations with respect to the taxes imposed by subtitle C or chapter 33, as the case may be, will henceforth be complied with, he may cancel such notification. Such cancellation shall take effect at such time as is specified in the notice of such cancellation.

3. Section 301.6311-1(a)(1)(iii) of the Treasury Department's Income Tax Regulations provides:

(iii) If one check or money order is remitted to cover two or more persons' taxes, the remittance should be accompanied by a letter of transmittal identifying—

(a) Each person whose tax is to be paid by the remittance;

(b) The amount of the payment on account of each such person; and

(c) The kind of tax paid.

APPENDIX B

ASSESSMENT AND PAYMENT RECORD OF HEMPHILL CONTRACTING CO. WITHHOLDINGS, JANUARY 1, 1974-APRIL 1, 1975 AS SHOWN IN THE RECORD IN THE DISTRICT COURT

I. *First Quarter, 1974*

Assessments		*Payments*	
Date of Return	Amount	Date of Payment	Amount
4/30/74	$22,474.89	2/19/74	$ 7,192.48
7/01/74	574.25*	8/15/74	15,856.66
Total assessments	$23,549.14	Total payments	$23,549.14

Excess of payments over assessments: $ 0.00
Sources: Government Exhibit Nos. 2, 3; Tr. 23-24.
*For penalties and interest assessed by Service.

II. *Second Quarter, 1974*

Assessments		*Payments*	
Date of Return	Amount	Date of Payment	Amount
7/30/74	$ 6,622.16	7/30/74	$ 6,622.16
Total assessments	$ 6,622.16	Total payments	$ 6,622.16

Excess of payments over assessments: $ 0.00
Sources: Government Exhibit Nos. 2, 4; Tr. 26.

III. *Third Quarter, 1974*

Assessments		*Payments*	
Date of Return	Amount	Date of Payment	Amount
10/31/74	$17,468.73	10/31/74	$17,468.73
Total assessments	$17,468.73	Total payments	$17,468.73

Excess of payments over assessments: $ 0.00
Sources: Government Exhibit Nos. 2, 5; Tr. 27-28.

IV. *Fourth Quarter, 1974*

Assessments		*Payments*	
Date of Return	Amount	Date of Payment	Amount
2/04/74	$18,977.19	11/05/74	$10,027.00
		11/14/74	1,098.23
		12/23/74	15,000.00
		01/27/75	5,000.00
Total assessments	$18,977.19	Total payments	$31,125.23
Excess of payments over assessments:			$12,148.04

Sources: Government Exhibit Nos. 2, 6; Joint Exhibit No. 1, Items D, E, F, G; Tr. 29-30; Tr. 71-74.

V. *First Quarter, 1975*

Assessments		*Payments*	
Date of Return	Amount	Date of Payment	Amount
04/30/75	$17,174.20	03/08/75	$ 5,000.00
		04/22/75	22,125.44
Total assessments	$17,174.20	Total payments	$27,125.44
Excess of payments over assessments:			$ 9,951.24
Carryover excess from previous quarter:			12,148.04
Total excess at end of quarter:			$22,099.28

Sources: Government Exhibit Nos. 7, 8; Joint Exhibit No. 1, Items I, J; Tr. 31-32.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-1484

UNITED STATES OF AMERICA, *Appellant,*

v.

JOHN HEMPHILL, *Appellee.*

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 11, 1976

Filed: November 8, 1976

Before LAY, Ross and HENLEY, *Circuit Judges.*

HENLEY, *Circuit Judge.*

On December 23, 1975 John Hemphill, a St. Louis, Missouri business man, was indicted by the federal grand jury for the Eastern District of Missouri on twelve charges of having violated § 7215(a) of the Internal Revenue Code (26 U.S.C.). The charges were that with respect to twelve separate weekly pay periods extending from May 9, 1975 through July 25, 1975 the defendant, an employer of labor, unlawfully failed to pay over into a special trust account in a bank withholdings from the wages of employees of Hemphill Contracting Co. for federal income and F.I.C. taxes within two banking days after the payments of wages, after having been required so to establish such an account and make payments into it by a notice duly served on him on May 1, 1975 pursuant to the provisions of § 7512 of the IRC.[1]

[1] Section 7215(a) makes it a misdemeanor for an employer to fail to comply with the requirements of § 7512. Each violation of § 7215(a) is punishable by a fine of not more than $1,000.00 or by imprisonment for not more than one year, or by both such fine and imprisonment.

The defendant pleaded not guilty and was tried before a jury in February, 1976. At the close of the government's case the defendant filed a written motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(a). That motion was denied. The motion was renewed in writing at the conclusion of all of the evidence, and ruling on it was reserved. The case was submitted to the jury on instructions to which neither side objected, and the jury found the defendant guilty on all twelve counts of the indictment.

Thereafter the defendant filed a written motion for a judgment of acquittal notwithstanding the verdict, or, alternatively, for a new trial. Fed. R. Crim. P. 29(c). That motion was briefed thoroughly by both sides.

On May 10, 1976 the district court granted the motion at the conclusion of proceedings conducted in open court. In the course of the proceedings the district court discussed briefly the reasons for the action taken. A formal order granting the motion was duly entered, and from that order the government appeals.

The jurisdiction of this court to entertain the appeal is no longer challenged by the defendant, and we consider that our jurisdiction is established. 18 U.S.C. § 3731; *United States* v. *Donahue,* 539 F.2d 1131 (8th Cir. 1976); *United States* v. *Lasater,* 535 F.2d 1041 (8th Cir. 1976).

For reversal, the government argues that it made a submissible case, that the issues were submitted to the jury on instructions more favorable than the defendant had a right to expect, that the district court erred in setting aside the jury's verdict, and that the case should be remanded to the district court with directions to reinstate the verdict and enter judgment thereon.

For affirmance or for a dismissal of the appeal, the defendant contends that the government did not make a case

sufficient to go to the jury. The defendant also contends that in its dealings with the defendant the Internal Revenue Service was guilty of such misconduct that the entry of a judgment of acquittal was appropriate.

The facts in the case are somewhat complicated, and to state them in detail would prolong this opinion unduly in relation to the questions ultimately presented by the appeal.

In our recent opinion in *United States* v. *Paulton,* — F.2d — (8th Cir. No. 75-1916 July 30, 1976), we discussed §§ 7215 and 7512 in some detail, and no useful purpose would be served by repeating that discussion here.

It was incumbent upon the government to prove by the evidence and beyond a reasonable doubt: (1) That during 1974 and 1975 the defendant was an "employer of labor," within the meaning of the IRC and pertinent regulations. (2) That prior to May 1, 1975 the defendant had failed properly to account for and pay over to the government withholdings of wages from the employees of Hemphill. (3) That on May 1, 1975 the defendant was served with the statutory notice prescribed by § 7512(a). (4) That the defendant unlawfully failed to comply with the notice with respect to the respective pay periods mentioned in the indictment.

The case was submitted to the jury on instructions which were perhaps more favorable to the defendant than he had a right to expect, but we observe that the government did not object to the instructions. As indicated, the jury found the defendant guilty on all counts of the indictment.

In passing upon the defendant's post-trial motion for judgment of acquittal notwithstanding the jury's verdict, it was not the prerogative of the district court to resolve conflicts in the testimony, or to pass upon the credibility of witnesses or the weight to be given their testimony; those

were jury functions; and the district court was not at liberty to set aside the verdict of the jury simply because the trial judge may have thought that the jury reached the wrong result. The district court was required, and we are required, to view the evidence in the light most favorable to the government, and to give to the government the benefit of all favorable inferences reasonably to be drawn from the evidence. And if the verdict of the jury was sustained by substantial evidence, it should not have been set aside by the district court on factual grounds. *See United States* v. *McColgin,* 535 F.2d 471, 473 (8th Cir. 1976); *United States* v. *Wisdom,* 534 F.2d 1306, 1309 (8th Cir. 1976); *Moore* v. *United States,* 375 F.2d 877, 879 (8th Cir.), *cert. denied,* 389 U.S. 844 (1967).

We have given careful consideration to the record in the cases which consists of the testimony of a number of witnesses, including the defendant, and numerous documentary exhibits.

We find that the case was a sharply contested one, and under the instructions of the district court the jury might well have acquitted the defendant. However, the jury was not required to accept the testimony of the defendant, or to accept his theory of the case. We are satisfied that the district court correctly submitted the case to the jury in the first instance, and that the verdict was sustained by substantial evidence and was a permissible one.

We observe that the theory of the defense was based primarily on certain dealings between the defendant and Internal Revenue Officer Robert L. Moore which dealings involved the Hemphill Contracting Co. and a defunct corporation, Hempbrook Contracting Co., in which the defendant had been a stockholder. Delinquent withholding taxes owed by Hempbrook had been assessed against the defendant personally and over a period of time the defendant paid

over to Moore out of Hemphill funds money that Moore applied to the defendant's personal Hempbrook obligation. The defendant contended at trial that those payments should have been applied so as to maintain in a current status the obligations of Hemphill, and he contended further that his dealings with Moore both before and after the § 7512 notice was served justified him in not complying with the notice. Defendant's testimony in support of those contentions was contradicted by the testimony of Moore. Additionally, Special Agent Wicker of the Intelligence Division of the Internal Revenue Service testified that the defendant had admitted to him that defendant had not opened the special account because defendant knew that after payments of wages Hemphill would not have funds sufficient to make proper payments into the account. The defendant denied that he made any such admission.

We think that the theory of the defense raised at most a legitimate jury question; defendant's theory was submitted to the jury, and the jury rejected it.

We have also considered the claim of the defendant that the conduct of Moore was so outrageous that the district court in the exercise of its supervisory powers over the administration of criminal justice was justified in entering a judgment of acquittal notwithstanding the jury's verdict. *See Hampton* v. *United States,* — U.S. —, 96 S.Ct. 1646 (1976); *United States* v. *Russell,* 411 U.S. 423 (1973); *Anderson* v. *United States,* 318 U.S. 350 (1943); *McNabb* v. *United States,* 318 U.S. 332 (1943); *United States* v. *Robinson,* — F.2d — (8th Cir. No. 75-1944 July 30, 1976); *United States* v. *Reifsteck,* 535 F.2d 1030 (8th Cir. 1976); *see also* the concurring opinion of Circuit Judge Brown in *Williamson* v. *United States,* 311 F.2d 441, 445 (5th Cir. 1962).

Assuming without deciding that the conduct of Moore and perhaps the conduct of other IRS personnel may have

been open to some criticism, we are convinced that neither Moore nor any other government agent involved in the case was guilty of such misconduct as to justify the action taken by the district court.

Accordingly, we reverse the judgment or order of the district court and remand the case with directions that the verdict be reinstated and judgment, including an appropriate sentence, entered thereon.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-355 CR (3)

St. Louis, Missouri
May 10, 1976

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JOHN HEMPHILL, *Defendant*.

Transcript of Oral Proceedings

The following proceedings were had on the date set forth herein before the HON. H. KENNETH WANGELIN, United States District Judge, presiding in Court No. 3 of the Eastern Division of the Eastern District of Missouri, United States Court & Customs House, 1114 Market Street, St. Louis, Missouri, with the defendant present in person.

APPEARANCES:

Mr. Terry Adelman, Assistant United States Attorney, for the Government;

Ms. Margaret Bush Wilson, for the defendant.

Certificate

I hereby certify that pages 1 through 7 herein contain a true and accurate transcript of my original stenotype notes taken at the place above set forth on May 10, 1976.

/s/ RICHARD L. SAUNDERS
Richard L. Saunders
Official Court Reporter
Court No. 3

[2] THE COURT: 75-355 CR (3), United States of America versus John Hemphill. Let the record show that the defendant, his counsel and the Government attorney are before the Court.

Let the record show that this matter came to trial and that there was a verdict of guilty as to Counts 1 through 12 inclusive; that these counts involved a failure to make required trust account deposits for F.I.C.A. and other matters of that nature on twelve successive weeks and while I don't have them added up exactly, I would say that it amounted to someplace between twelve and fifteen thousand dollars.

At the end of the Government's case there was a motion filed for a verdict of acquittal, which the Court reserved a ruling on and I let the matter go to the jury. The jury found that Mr. Hemphill had been notified of the demand of the Government that he make those payments and that he had failed to do so.

The evidence in the file—and I have the exhibits here—indicated that—can you tell me, ma'am, about how much he had paid from Hemphill Contracting—seems to me it was in excess of fifty thousand, is that correct? But in any event, the claim for which he was indicted here was a failure as a managing officer—let me read the indictment.

"That John Hemphill, as President of Hemphill Contracting Company, was an employer," and so forth, " . . . and that he as the President failed . . . " to do certain things.

[3] Well, of course, the Government's testimony from the witness that Mr. Hemphill paid the money to clearly indicated that they took from Mr. Hemphill checks on the Hemphill Contracting Company for matters which they said were Mr. Hemphill's personal tax liability.

Now, by what I'm going to do in this case, don't let anybody get the idea that I think people shouldn't pay their

taxes, and I also feel that in this day and time it is mandatory that the deductions from employees wages such as their tax and other—income tax and other things must be deducted, and should be, but there are two sides to any coin.

In this situation and in a recent decision from the Eighth Circuit—and I'm referring to the slip opinion in *United States of America versus C. M. Coleman,* it was an appeal from United States District Court from the Northern District of Dakota and this is an en banc decision, and this language is used:

"In connection with the approval of an instruction, the word 'wilfully' used in connection with this offense means deliberately and intentionally without justifiable excuse."

Now. this was an income tax matter, but the language is clear. This decision, incidentally, is No. 74-1759 and it was filed on August the 27th, or submitted June the 11th, filed August the 27th of 1975.

[4] Now, I asked at the last session we had on this matter that I be advised—because it's very simple, that if Mr. Hemphill was allowed to pay his personal taxes with checks on the Hemphill Construction Company, it's rather obvious to me, depending on how the Internal Revenue Service handled it, that it might be personal income to him, I don't know, but this is a situation where the Internal Revenue Service seeks to convict this man and where the penalties in this case could range up to twelve years in jail or substantial fines. But, anyway, I requested from the Internal Revenue Service their explanation, in which they in their last sentence of the first paragraph says in short:

"The Court wishes to learn if the Government plans to charge Mr. Hemphill with these monies as personal income." And then they go ahead for another paragraph and say that they are not—they have not at this time de-

cided if an investigation will be initiated into Mr. Hemphill's personal tax liability. That, in the face of the obvious variance in their own agent's testimony on this witness stand under oath where at one time he said, well, some of these checks were for five, ten, twenty-five thousand dollars, you know, just come in and give me some money, and the agent took this money from the Hemphill Construction Company, and if my arithmetic is any good—and I don't know what Mr. Hemphill's tax liability personally is, and I don't care, that's between him [5] and the United States Government and the Internal Revenue Service. The thing I do know is that by their own testimony and by checks that are exhibits in this file, that they took money from him, from the Hemphill Construction Company, and if he had been credited for that, which he should have been, because that was the source of it, it wasn't payable to him and endorsed over, that he would not have had any liability under his F.I.C.A. and when a citizen of the United States goes to an agent of the Internal Revenue Service and they just say: Well, give me some money, he's entitled to know what it's for, and as far as I can tell, he didn't.

Now, there's no question that they told him to put these monies in a trust account, and there's no question that he didn't do it, but because of that evidence I cannot see why or how that this man could reasonably be charged with a criminal violation on twelve counts.

Now, let's get to the other thing that amazes this Court. I have before me a letter of—from the Department of Housing And Urban Development dated April 13th to Mr. Hemphill, which was furnished to me by his counsel, and the first paragraph is:

"This office has received information indicating that you have been charged, tried and convicted in pursuance of the provisions of Section 7215 and 1512 of Title 26 of the United States Code," and this letter is signed by Mr. Johnny [6] Bullock, Jr., the Area Director.

Well now, I will agree with him that Mr. Hemphill has been charged, and I will agree with him that Mr. Hemphill has been tried, and I will agree that the jury came in with a verdict of guilty, but I do not believe under the laws of this nation that amounts to a conviction, am I right, ma'am?

Ms. Wilson: I will agree, Your Honor.

Mr. Adelman: Sentence is a conviction.

The Court: That's right. "In order to protect the public interest or the interest of the Department of Housing And Urban Development (DHUD), your debarment from all participation in all programs of said department is being considered and you will be allowed to have a hearing within ten days," and so on.

Well, I've got news for Mr. Bullock. He was not convicted and the only other further comment I have in this matter is that the Court is this day entering an order that this matter is before the Court upon the motion of the defendant for a judgment of acquittal or for a new trial notwithstanding the verdict.

After consideration of the matter it is hereby ordered that the motion of the defendant for a judgment of acquittal be and is granted.

Now, Mr. Hemphill, I don't want you to get the idea—if you've been fooling around with the Internal [7] Revenue Service that's dangerous business and I'm not saying you have or you haven't. All I'm saying by this is that on the information presented to this Court, while you may have been technically guilty under the laws as I read it, you may have been taken advantage of, you may not. I don't know what position the Internal Revenue Service is going to take in this matter, haven't the slightest idea. I asked them to tell me and they said they couldn't. Well, I'll leave that up to them. And I don't want you to think, sir, that as the old saying goes, you have "gotten away" with

anything. And I'm certain that your counsel, Miss Wilson, will advise you of the situation.

But let the record show that the letter from the Internal Revenue Service or a photostatic copy of it, is filed as an exhibit in this case and also that the letter from Mr. Bullock of the Department of Housing And Urban Development is also being filed, and that will be all.

You may be discharged at this time, sir.

THE DEFENDANT: Thank you, Your Honor.

* * * * * * * * *